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No. 07-323

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

ARCHDIOCESE OF WASHINGTON, *et al.*,

Petitioners,

v.

WILLIAM MOERSEN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Whether the Petitioners have presented compelling reasons to grant the Petition, where the Maryland Court of Appeals determined, after applying the "primary duties" test, that the ministerial exception did not apply to a church organist and the decision of the Maryland Court of Appeals does not conflict with a decision of this Court, a federal court, or another state court of last resort, and the decision does not implicate an important, unsettled federal question.

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INTRODUCTION

The Petitioners have failed to demonstrate that there is any need to "clarify the scope of the ministerial exception". As the Petitioners correctly point out, the ministerial exception springs directly from prior precedent of this Court. *See Watson v. Jones*, 80 U.S. 679 (1871) and *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.* 344 U.S. 94 (1952). There is no confusion among state and federal courts as to which employees the ministerial exception applies. The federal and state courts have embraced the "primary duties" test set forth in *Rayburn v. Gen. Conference of Seventh Day Adventist*, 772 F.2d 1164 (4th Cir. 1985) as the means of determining which employees fall into the ministerial exception. Petitioners are simply dissatisfied with the results of the application of the "primary duties" test by the Maryland Court of Appeals to the Respondent's position and they wish to broaden the scope for their own self interests. If the Petitioners' overly broad interpretation of the ministerial exception was adopted virtually every employee of the church would fall into the ministerial exception.

Petitioners also contend that this Court should grant the Petition to clarify the scope of the ministerial exception because the decision of the Maryland Court of Appeals is in conflict with the decisions of the federal and state courts. However, there is no conflict between the Maryland Court of Appeals and the decision of any other court regarding the ministerial exception. The Maryland Court of Appeals in its decision clearly considered prior federal precedent and utilized the "primary duties" test set forth by the Court of Appeals

for the Fourth Circuit in *Rayburn* in coming to the conclusion that the Respondent's position did not fall within the ministerial exception. The Maryland Court of Appeals did not reject any federal court precedent or create new precedent in coming to its decision.

STATEMENT OF THE CASE

St. Catherine Laboure Parish ("the Parish") employed the Respondent, William Moersen ("Mr. Moersen"), at various times over a period of twenty-nine (29) years, from 1958 to 1976, and again from 1991 to 2002. Maryland Court of Appeals Joint Record Extract ("R") E 25-26. On or about July 11, 2001, Mr. Moersen and Robert Amey, on behalf of the Parish, entered into an employment contract for the services of Mr. Moersen as organist/pianist/keyboard accompanist at the Parish at a salary of Twenty Six Thousand Five Hundred Dollars ($26,500.00) per year and other remuneration including health, disability and retirement benefits. R. E 23.

The employment contract between Mr. Moersen and the Parish provided that "[b]y mutual agreement the parties to the contract may terminate this contract in writing with advance notice of 90 calendar days". R. E 20-21.

The employment contract also contained job objectives which Mr. Moersen was not required to perform and had never been required to perform in the past. Mr. Moersen's duties and responsibilities at St. Catherine Laboure were to provide Organ/Piano/Keyboard music and/or musical accompaniment to both

the congregation and the choir(s) of St. Catherine Laboure Church at the 10:00 a.m., 12:00 noon, and 1:15 p.m. Sunday services; to provide the same at the weekly Saturday 5:15 p.m. service; to provide musical accompaniment for the weekly choir rehearsals on Tuesday evenings and Friday evenings; to provide musical accompaniment at special services when requested and to provide musical accompaniment for the congregation at the 7:00 p.m. Monday night weekly novena service. R. E 47-48.

Mr. Moersen did not plan nor select the music associated with the worship at any of the liturgies. The music planning and selection was done by either the Music Director or choir director(s). R. E 49.

Mr. Moersen never performed any duties in a leadership, teaching or training capacity and there were no individuals, including but not limited to employees, congregation members or students, under his supervision. R. E 50.

Mr. Moersen was not required to attend staff or committee meetings, and was not listed as a staff member on the church directory of St. Catherine Laboure. R. E 50.

Mr. Moersen was not required to profess, support or become a member of the Catholic faith. Mr. Moersen also performed as organist or pianist for other religious groups including Jews, Moslem and Hindu and was never required to profess, support or be a member of any of these faiths to perform as pianist or organist. R. E 50-51.

Mr. Moersen originally began working at the Parish in 1958 as an organist, when he was eleven (11) years

old. At or around that same time, the Parish hired a choirmaster who sexually abused Mr. Moersen, from 1958 through 1964. These acts of sexual abuse of Mr. Moersen occurred at the Parish itself during church services, at church-sponsored functions, and at other locations. Beginning in 1958 and through 1964, Mr. Moersen communicated to at least four (4) different priests that he was being abused. All of these priests praised him for his honesty and advised Mr. Moersen to get himself out of the situation. However, the Parish never took any action against the offender. R. E 24.

In 2001, Robert Amey was the Pastor in charge of Saint Catherine Laboure Parish and, as such, had the power to hire and discharge parish employees, including Mr. Moersen. On or about September 2001, Mr. Moersen informed Robert Amey that he had suffered sexual abuse at the hands of a choirmaster from 1958 to 1964. R. E 24.

Mr. Moersen confided in Robert Amey as a counselor and a church leader regarding the horrific abuse he has suffered as a child. Mr. Moersen was seeking counseling and assistance from Robert Amey as his superior. Mr. Moersen requested that Robert Amey relay his allegations of abuse to church superiors and Robert Amey assured Mr. Moersen that he would report the allegations of abuse. R. E 24.

Immediately after reporting the sexual abuse to Robert Amey in September 2001, Mr. Moersen's employment situation began to deteriorate in that Robert Amey's treatment of Mr. Moersen changed. After September 2001, it became evident to Mr. Moersen that

Robert Amey intended to terminate his employment. Robert Amey had begun to find fault with Mr. Moersen shortly after Mr. Moersen had informed Robert Amey of his childhood sexual abuse. Prior to this time, Mr. Moersen's performance record had been exemplary and Mr. Moersen had never received a negative performance evaluation or warning in his twenty-nine (29) years of employment with the Parish. R. E 25.

In November 2001, Robert Amey suggested to Mr. Moersen that he should retire from his position with the Parish. Robert Amey also offered to pay Mr. Moersen up to $2,000.00 to seek psychiatric counseling. R. E 25. On February 17, 2002, Robert Amey terminated Mr. Moersen's employment, unilaterally and with no advance notice. R. E 25.

On March 11, 2003, Mr. Moersen filed a Complaint filed with the Circuit Court for Prince George's County, Maryland, *pro se*. R. E 6. The Complaint alleged breach of contract, wrongful termination and intentional infliction of emotional distress against the Petitioners, Archdiocese of Washington, Reverend Robert Amey and St. Catherine Laboure. R. E 6. On October 12, 2003, Mr. Moersen filed an Amended Complaint. R. E 23. On December 1, 2003, Petitioners filed a Motion to Dismiss Amended Complaint which was denied by Judge Platt on March 22, 2004. R. E 2, 5. Petitioners then filed a Motion for Summary Judgment on May 3, 2003 which was granted by Judge Platt after oral arguments on May 27, 2004. R. E 52-53.

Mr. Moersen filed a Notice of Appeal to the Court of Special Appeals on June 23, 2004 of Order dated May

27, 2004, granting Defendants' Motion for Summary Judgment and dismissing the Amended Complaint. R. E 54.

In an unpublished opinion, the Court of Special Appeals reversed the holding of the trial court finding that the ministerial exception did not apply to the duties of Mr. Moersen as the organist for St. Catherine Laboure. While the Court of Special Appeals acknowledged that music was generally an important part of the Catholic faith, the court found that Mr. Moersen's "position fell outside the ambit of the ministerial exception" App. 53a. The Court of Special Appeals contrasted Mr. Moersen's position with the organist/music director in *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. App. 1989) and found that Mr. Moersen merely played the organ at various services, while the in *Assemany*, the organist/music director "had assumed a far more significant role in religion and liturgy." App. 54a.

The Petitioners filed a writ of certiorari with the Maryland Court of Appeals which was granted on October 3, 2005. The Maryland Court of Appeals affirmed the decision of the Court of Special Appeals in a 4-3 decision agreeing that Mr. Moersen's position was not covered by the ministerial exception. App 13a.

REASONS FOR DENYING THE PETITION

Petitioners have presented no "compelling reason" for this Court to grant their Petition for Writ of Certiorari as required by Supreme Court Rule 10. The Petitioners fail to demonstrate that the decision of the Maryland Court of Appeals is in conflict with a decision of this Court or another Court of Appeals or that the Maryland Court of Appeals decided an important federal question that has not been settled by this Court. See Sup. Ct. R. 10(a)-(c).

I. The Scope Of The Ministerial Exception Is Well Established And Needs No Clarification

The Maryland Court of Appeals adopted and applied the "primary duties" test set forth in *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) and adopted by the federal courts. In reaching its decision, the Maryland Court of Appeals was clearly guided by the United States Constitution and precedents from this Court and the federal courts. This is verified by the Maryland Court of Appeals recounting in its opinion the origin of the ministerial exception and its constitutional implications. App. 2a-7a.

The ministerial exception finds its roots in the Free Exercise Clause of the First Amendment which provides religious institutions with significant freedoms with respect to matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." *Downs v. Roman Catholic Archbishop of Baltimore*, 111 Md. App. 616 (1996).

Churches have "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 116 (1952). Similarly, Article 36 of the Maryland Declaration of Rights limits governmental interference with the internal management of religious organizations.

In adherence to the constitutional principles of free exercise of religion, the federal courts have carved out a ministerial exception to otherwise neutral employment laws, allowing religious institutions to select their clergy members without fear of reprisal from civil courts. In addition to ordained ministers, the ministerial exception has been extended by the courts to include employees whose "primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in religious ritual and worship," or any position that is "important to the spiritual and pastoral mission" of the religious organization. *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).

The ministerial exception exempts from coverage of employment laws the relationships between religious institutions and their ministers. See, *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328 (4th Cir. 1997). The exception applies to employment decisions by religious organizations concerning ministers, teachers, and other employees whose duties are "integral to the spiritual and pastoral mission" of the religious organization. *EEOC v. Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795 (4th Cir. 2000).

While the ministerial exception shields certain employment decisions from the scrutiny of civil authorities to preserve the independence of religious institutions in performing their spiritual functions, if no spiritual function is involved, the First Amendment does not bar the application of generally applicable laws to religious employers. *Rayburn v. Gen. Conference of Seventh Day Adventist*, 772 F.2d 1164 (4th Cir. 1985).

The courts have held that the ministerial exception does not apply to employment decisions concerning employees that function in secular, lay, custodial or administrative capacities. The courts have held that a church's employment practices may be scrutinized where it does not involve the church's spiritual functions. See *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (Title VII could be applied to promotion of secular teacher in religious educational institution); *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), *cert. denied*, 456 U.S. 905 (1982) (Title VII applicable to administrative and support staff at a seminary); *EEOC v. Pacific Press Publishing Ass'n*, 676 F.2d 1272 (9th Cir. 1982); *Whitney v. Greater New York Corporation of Seventh-day Adventists*, 401 F. Supp. 1363 (S.D.N.Y. 1975) (typist-receptionist).

The courts have developed a "primary duties" test to determine if a particular job falls into the ministerial exception. In applying the "primary duties" test, the court must examine the functions of the position. The application of the ministerial exception is not unlimited and its application in any case requires a fact-specific examination of the functions of the particular position. *Rayburn, supra.*

This decision by the Maryland Court of Appeals demonstrates that the application of the "primary duties" test is sufficient to prevent excessive governmental entanglement into religious affairs. Federal and state courts have applied the "primary duties" test in many other instances and reached the determination that other church or religious employees were not covered by the ministerial exception. These prior decisions did not create excessive governmental entanglement which would violate the First Amendment of the United States Constitution.

The courts have determined in a number of contexts that where the employee does not fall into the ministerial exception, the United States Constitution does not deprive the courts of jurisdiction over employment controversies. The courts have allowed non-ministerial employees to maintain suits against religious organizations under Title VII, Fair Labor Standards Act and the Age Discrimination in Employment Act without creating excessive governmental entanglement in religion. *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993); *Weissman v. Emeth*, 38 F.3d 1038 (8th Cir. 1994); *Demarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993) and *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990).

In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1398 (4th Cir. 1990), the court determined that application of the Fair Labor Standards Act ("FLSA"), to a church school did not violate the Free Exercise of Religion or the Establishment Clause of the First Amendment. Similarly, in *Weissman v. Emeth*, 38 F.3d 1038 (8th Cir.

1994), the court found that the Age Discrimination in Employment Act ("ADEA"), applied to a Jewish Temple and did not violate the First Amendment especially when the Temple had not advanced any religious reasons for terminating Weissman.

In *Weissman*, the court found it significant that the employer did not assert any religious reason for terminating Weissman, stating, "in the present case, the Temple failed to allege any deficiencies in these arguably religious duties or to assert any other religious reasons for Weissman's termination." The court concluded that the ADEA was applicable where an employee is not a member of the clergy and none of the asserted reasons for termination rested on religious grounds. *Id.*

In *Smith v. Raleigh Dist. of N.C. Methodist Church*, 63 F. Supp. 2d 694 (E.D. N.C., 1999), the court, in a Title VII case, examined the plaintiff's claims and found that the Church had not shown how any particular religious doctrine of belief would be implicated by the court assuming jurisdiction over the suit. The court found that the matter could be resolved "by reference to neutral principles of law." *Id.* at 714. The court also stated that litigation itself is not improper entanglement "where the litigation does not impinge upon core ecclesiastical matter." *Id.* at 718.

In the instant matter, Respondent filed a Complaint in the Circuit Court for Prince George's County, Maryland, *pro se*, on March 11, 2003. R. E 6. The Complaint alleged breach of contract, wrongful termination and intentional infliction of emotional distress against the Petitioners. The Respondent's

claims can be decided utilizing generally applicable, neutral principals of law. The Respondent's claims are based on traditional legal concepts of contract and tort law and do not require the court to examine any aspect of church doctrine or governance.

The Maryland Court of Appeals considered and followed clear precedents regarding the ministerial exception and the "primary duties" test set out by the federal courts in reaching its decision. This decision does not demonstrate that there is a need for clarification of the ministerial exception but shows that the "primary duties" test set forth by the federal appeal courts properly balances the First Amendment rights of religious employers and the rights of employees.

II. The Maryland Court Of Appeals Decision Is Not In Conflict With The Decisions Of Any Other Court

The decision of the Maryland Court of Appeals is not in conflict with a decision of this Court, a federal court, or another state court of last resort. Contrary to the Petitioners' assertion, the Maryland Court of Appeals only declined to apply the ministerial exception to the Respondent's position after that court carefully reviewed and considered the precedents of federal and state courts regarding application of the ministerial exception. The Maryland Court of Appeals then analyzed the Respondent's position under the "primary duties" test and considered each aspect of the test in reaching its ultimate decision that the Respondent's position did not fall within the ministerial exception.

In *Starkman v. Evans*, 18 F. Supp. 2d 630 (E. D. La. 1998), the court set out a three-pronged test based on *EEOC v. Southwestern Baptist*, 651 F.2d 277 (5th Cir. 1981):

> "One factor is whether the employment decision regarding the position at issue are made "largely on religious criteria"." (quoting *Southwestern Baptist*, 651 F.2d at 283). *Id.* at 633.
>
> A second consideration is whether the plaintiff was "qualified and authorized to perform the ceremonies" of the Church. (quoting *Southwestern Baptist*, 651 F.2d at 284). *Id.* at 634.
>
> The third and most pertinent factor is whether plaintiff is "engaged in activities traditionally considered ecclesiastical or religious"". (quoting *Southwestern Baptist*, 651 F.2d at 284). *Id.* at 634.

Because the Respondent was not ordained clergy and his job duties are not obviously ministerial in nature, the Maryland Court of Appeal engaged in a fact-specific inquiry of the Respondent's job duties before making a determination as to whether the ministerial exception would apply. The Court of Appeals stated:

> "Central to determining whether the ministerial exception applies in the case *sub judice* is deciding what, in fact, Moersen's role was in the church, which, in turn, requires an assessment of his duties." App. 11a.

The Maryland Court of Appeals first started with an analysis of the Respondent's position in the church and determined, by the abundant factual evidence in the record, that the Respondent played the organ, piano and keyboard during religious services and at other times as required. At the time of his termination, the Respondent worked under an employment contact which enumerated specific duties. Petitioners argued that duties specified in The Respondent's employment contract were sufficient to show that The Respondent's position was ministerial. However, the record showed that the Respondent was not required to perform any of the job duties specified in his contract other than playing the piano, keyboard and organ as directed and this was undisputed by the Petitioners. *Archdiocese of Washington v. Moersen*, 925 A.2d 659 (Md. 2007). App. 11a and 17a.

Petitioners prepared Respondent's contract and Petitioners' attempt to designate the job as ministerial through the contract is not dispositive. In *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277 (5th Cir. 1981), the court stated that, "[w]hile religious organizations may designate persons as ministers for their religious purposes free from any governmental interference, bestowal of such a designation does not control their extra-religious legal status." *Id.* at 283. The Maryland Court of Appeals, after examining the facts in the records, applied the "primary duties" test to the Respondent's actual job duties as opposed to the one's specified in the employment contract.

The Respondents also argue that the Maryland Court of Appeals has reached a different result from

other courts who have considered whether a church organist was a ministerial employee. An examination of those cases show that the positions held and duties performed by the plaintiffs in those cases were significantly different from that of the Respondent in this case.

The Maryland Court of Appeals stated:

> "The cases on which the petitioners rely, although supportive of the proposition that "despite its name, it is well recognized that the 'ministerial' exception applies to lay employees in addition to ordained ministers and clergy members," do not mandate a different result in this case *sub judice*. They are distinguishable. In each, the subject job or position had a far greater significance to the religious mission than does the respondent's position and, thus, the ministerial exception was appropriately applied." App. 20a.

It is clear that under the application to the "primary duties" test the Respondent's position would never be considered ministerial. To circumvent this obvious conclusion the Petitioners have argued that the Respondent's mere participation in religious worship or ritual made his position ministerial under the "primary duties" test. The Maryland Court of Appeals disagreed. A review of the state and federal precedent show that the Petitioners' position is not supported as no court has ever held that mere participation in religious worship or ritual is sufficient to make a position ministerial.

The Maryland Court of Appeals contrasted the position of the Respondent with the position discussed in *Rayburn* and stated:

> "[W]e do note that the significance of the respondent's position and the level of participation is far different than the position occupied by the appellant in *Rayburn*. The respondent was not in absolute control of the music played, and he did not lead any choirs, teach any hymns, or control any part of the church services in which he participated. He was neither required to have a specialized knowledge of the Catholic faith, nor expected to have any particular religious training. All he needed was knowledge of how to play an organ." *Archdiocese of Washington, v. Moersen*, 925 A.2d 659, (Md. 2007). App. 19a.

In *Starkman*, the court concluded, after applying the three-pronged test, that the plaintiff's position as a music director was ministerial because the plaintiff played an integral role at the church. However, the court cautioned that the decision did not mean that every music director at every church was a ministerial employee. *Id.* at 635. In particular, the court pointed to *Weissman v. Congregation Shaare Emeth*, 38 F.3d 1038 (8th Cir. 1994), which held that the position of Jewish temple administrator was not ministerial because the administrator "played no role in decisions relating to spiritual matters." *Id.* at 1040.

The Respondent's position as organist/pianist/keyboardist can be easily distinguished from the

leadership position of the Musical Director held by both plaintiffs in *EEOC v. The Roman Catholic Diocese of Raleigh, North Carolina*, 213 F.3d 795 (4th Cir. 2000) and *Assemany v. Archdiocese of Detroit*, 434 N.W.2d 233 (Mich. 1989).[1]

In *Roman Catholic Diocese of Raleigh*, 213 F.3d 795 (4th Cir. 2000), the court in examining the duties of the plaintiff, who served as the Director of Music Ministries for the parish, stated:

> "Austin was clearly a pivotal figure in most, if not all, aspects of the musical life of the Cathedral and school. The various job descriptions for the music ministry positions, though not dispositive, unmistakably evince the religious significance of her music ministry. Austin was required to assist in the planning of liturgies and was in charge of the parish choirs — functions at the very heart of the church's musical life. The positions also entailed responsibility for recruiting choir members, cantors, and special musicians. The job description for the new music ministry position sought by Austin — which Austin claims was essentially the same as her own job description— emphasized that this "liturgical

1. All of the cases cited by Petitioners involve music directors. *See Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App. 1988) (Music Director); *Miller v. Bay View United Methodist Church*, 141 F. Supp. 2d 1174 (E.D. Wis. 2001) (Choir Director and Music Director); *Fassl v. Our Lady of Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253, at E.D. Pa. Oct. 5, 2005) (Director of Music).

> minister" must "assist in developing a prayerful, singing assembly" and "support the Gospel message through song and challenge the assembly to live it more fully." The description also conferred upon the Director of Music Ministries responsibility "for all music associated with worship" and detailed a number of duties relating to the selection and presentation of liturgical music." *Id.*
>
> "Austin also served as a representative of the church to the congregation. She played a prominent role in worship services and helped to lead the congregation in song." *Id.*
>
> "These duties, *coupled* with the spiritual significance of her teaching role, render her position at the Cathedral school "ministerial" for purposes of the exception." *Id.* (Emphasis supplied).

The Maryland Court of Appeals noted that while there were some similarities between these two cases, "there are key differences as well. Moersen was not a "music minister". He was not a "pivotal figure" at the church, did not plan any liturgies himself, and he was not in charge of the church's "musical life". He did not teach the choir any music, and he was not listed as Parish Staff." App. 28a.

In *Assemany*, 434 N.W.2d 233 (Mich. 1989), the plaintiff served in a leadership position as the Musical Director for the parish. The plaintiff was not merely an "organist" but had complete responsibility for all liturgical music for the parish. *Id.* at 234.

In recounting the plaintiff's duties the court stated:

> "Plaintiff was required to have a working knowledge of the Catholic religion and liturgy. He was responsible for the selection and teaching of all liturgical music in the parish. His primary responsibility was to enable and encourage the Gesu choir and congregation to participate in the Catholic liturgy through song. Plaintiff assumed a pastoral-liturgical leadership role in the parish. He was the head of the musical branch of the Catholic liturgy there. Plaintiff was intimately involved in the propagation of Catholic doctrine and the observance and conduct of Catholic liturgy by the Gesu congregation." *Id.*

The Maryland Court of Appeals comparing the position of the Respondent to the plaintiff in *Assemany* rejected Petitioner's position and concluded that the case:

> "does not stand for the general proposition that an organist position is covered by the ministerial exception. As the Court of Special Appeals explained, the court's holding that the organist was covered by the ministerial exception was based on reasons other than the employees job title; the organist in *Assemany*, unlike the respondent, also was the head of the musical branch of the Catholic liturgy in the church, and had a "leadership role" in the parish." App. 29a.

Petitioners also argued that music is integral to the spiritual and pastoral mission of the Catholic Church. The Maryland Court of Appeals agreed that while music is important to the Catholic Church, this alone was not dispositive, but an examination of the role the Respondent played in the Church's music ministry was required.

> "Similarly, in *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350 (Minn. Ct. App.2004), the employee was the music director. "responsible for managing and rehearsing Hamline Methodist's choir, selecting and preparing music for regular Sunday services and other special services, playing the organ, and supervising the other church music groups, such as the children's choir and the hand bell choir." It was with reference to those duties that the court held that the ministerial exception applied." *Archdiocese of Washington, v. Moersen*, 925 A.2d 659, (Md. 2007). App. 29a.

The Maryland Court of Appeals also concluded that the position of Mr. Moersen was different from the position of the plaintiffs in *Musante v. Notre Dame of Easton Church*, No. 310-CV-2352, 2004 WL 721774 (D. Conn. Mar. 30, 2004) a Director of a Religious Education who trained ministers; *Miller v. Bay View United Methodist Church*, 141 F. Supp. 2d 1174 (E.D. Wis. 2001), a church music director and *Fassl v. Our Lady Perpetual Help Roman Catholic Church*, No. 05-CV-0404, 2005 WL 2455253 (E.D. Pa. Oct. 5, 2005), a Director of Music.

An examination of the cases discussing the "primary duties" test show that not only must the music ministry of the church be integral to the spiritual and pastoral mission of the church, The Respondent must also play an integral or pivotal role in ministry before his position can be considered ministerial. To hold otherwise would make the ministerial exception overly broad. See, *Dole v. Shenandoah Baptist Church*, *supra*.

The Respondent's limited duties of organist/pianist/keyboardist are not the integral duties that have been determined by the courts to be ministerial in nature. The difference between The Respondent's position and that of an employee serving an integral role is illustrated by *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003). In *Alicea-Hernandez*, the court ruled that the Hispanic Communications Director was a "minister". The court pointed out that Alicea-Hernandez served as a "liaison between the church and the community" and was "integral in shaping the message that the church presented." The court however, pointed out that if Alicea-Hernandez simply served as translator, then her position would not have been ministerial. Under Petitioners' broad interpretation of the primary duties test, even a translator's position would be ministerial if the translator translated during the church services.

The Maryland Court of Appeals compared the Respondent's position to the plaintiff in Alicea-Hernandez, and concluded that there were key differences in these positions:

> "Unlike the employee in *Alicea-Hernandez*, Moersen was not the "voice" of

> the church. It was the Cantor that led the Parish and choir in song, and Moersen merely accompanied him. Not only did he not preach or inculcate values, he did not decide how the message was expressed." App. 28a.

In *Shaliehsabou v. Hebrew Home of Greater Washington, Incorporated*, 363 F.3d 299 (4th Cir. 2004). The court discussed in great detail the requirements for the ministerial exception. The court found that the position of a Jewish Mashgiach or kosher food supervisor was ministerial. In discussing the role of the Jewish Mashgiach, the court noted that "Shaliehsabou, like the Director of Music Ministry in Diocese of Raleigh, is the primary human vessel through whom the Hebrew Home chose to assure that the Jewish dietary laws were followed." *Id.* at 308.

The Maryland Court of Appeals in comparing the position of the Respondent to that of the plaintiff in *Shaliehsabou* stated:

> "Moersen was not required to have any specialized knowledge of the Catholic faith. Stated another way, his lack of knowledge of many aspects of the Catholic faith did not prevent him from doing his job. This is unlike the plaintiff in *Shaliehsabou*, who, without very specific training, would mot have been permitted to hold the position of Mashgiach, much less perform that role."

The Respondent held the positions of organist/pianist/keyboardist. The Respondent did not serve as a

spiritual leader. The Respondent did not serve in a supervisory or teaching capacity. The Respondent did not play a pivotal role in the church's music ministry but played a limited role under the supervision of the choir director. The Respondent's position is similar to the position of secular, lay, custodial, administrative or support staff. The Respondent was not the primary human vessel through whom St. Catherine Laboure chose to handle its music ministry. The Respondent's position with the Parish is not "pivotal" or "integral" to the music ministry but more analogous to the role of the translator referred to by the court in *Alicea-Hernandez v. Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003).

There is no confusion among the courts as to the application of the ministerial exception. In applying the "primary duties" test to other positions, other courts have reached a similar conclusion that some religious employees are not covered by the ministerial exception.

In *Weissman v. Emeth*, 38 F.3d 1038 (8th Cir. 1994), the court found that Weissman, who was employed as a temple administrator for a Jewish Temple, was not a member of the clergy. The court quoted *Demarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993), for the proposition that the mere fact that the employee may have some religious duties did not make the position ministerial.

Several courts have found that teachers of religious schools are not "ministers" under the ministerial exception. In *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389 (4th Cir. 1990) and *Geary v. Visitation of The Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir.

1993), the courts have found that teachers at religious schools, who perform some religious functions or duties, do not fall into the ministerial exception.

In *Demarco v. Holy Cross High School*, 4 F.3d 166 (2nd Cir. 1993), the court found that the ADEA was applicable to a teacher of a Catholic School. Holy Cross argued that the ADEA was "inapplicable to claims brought by members of the clergy against their religious employers." The court however rejected the argument that teachers in the Catholic school were "clergy".

In *Demarco*, the court drew a distinction between cases in which the employer/employee relationship is so pervasively religious that no inquiry could be made without violating First Amendment principles and those involving lay or secular employees where limited inquiry could be made without violating First Amendment principles. *Id.*

Similarly, in *Geary v. Visitation of Blessed Virgin Mary Parish School*, 7 F.3d 324 (3rd Cir. 1993), the ADEA was applicable to a teacher of a Catholic school who performed some religious duties. The court stated that "notwithstanding Geary's apparent general obligation to be a visible witness to the Catholic Church's philosophy and principles, a court could adjudicate Geary's claims without the entanglement that would follow were employment of clergy or religious leaders involved." *Id.*

In *Dole v. Shenandoah Baptist Church, supra*, the court found that the Fair Labor Standards Act ("FLSA") applied to the teachers of a Church school. The Church

argued that the teachers were ministers covered by the ministerial exemption under FLSA. In the school, all classes were taught from a pervasively religious perspective and the teachers were required to lead the students in prayer and subscribe to the school's statement of faith as a condition of employment. After considering the factor of the "primary duties" test, the court found that the teachers were not ministers.

In *Dole*, the court distinguished that case from *Rayburn v. General Conference of Seventh-Day Adventist*, 722 F.2d 1164 (4th Cir. 1985), *cert. denied*, 478 U.S. 1010 (1986) where the claimant was a teacher at the church's theological seminary who was seeking appointment to the seven-person pastoral staff of one of the denomination' congregation. The *Dole* court stated that "[t]he teachers in the present case perform no sacerdotal functions; neither do they serve as church governors. They do not belong to any clearly delineated religious orders." *Id.* at 1396.

Clearly the Maryland Court of Appeals considered and correctly applied prior federal precedent's regarding the ministerial exception and this decision does not create a conflict warranting certiorari review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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